No. 144.

Brief of Maxwell v Goebel for P. E. (on ans.)

Filed Nov. 15, 1897.

Supreme Court of the United States.

OCTOBER TERM, 1897.

No. 144.

JOHN T. POWERS, *Plaintiff in Error*,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY,

Brief for Plaintiff in Error in Opposition to the Motion to Dismiss.

Printed by JAMES BARCLAY, 108-110 Canal St., Strobridge Building, Cincinnati, O.

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Brief for Plaintiff in Error in Opposition to the Motion to Dismiss.

The state court refused to relinquish jurisdiction. The Circuit Court of the United States insisted on assuming jurisdiction. Both courts have rendered final judgment on the merits, the state court in favor of the plaintiff, the federal court in favor of the defendant. Objection was duly made in the circuit court to its assumption of jurisdiction. And yet the defendant in error says that the jurisdiction of that court is not in issue, and on that ground moves to dismiss the writ of error.

We submit that the case is the very one provided for by the first clause of section 5 of the act of March 3, 1891. It is a case in which the jurisdiction of the Circuit Court of the United States, as a federal court, to render the final judgment complained of, is in issue, and the plaintiff having elected to test the question of jurisdiction alone, has sued out a writ of error to this court.

In the nature of things the controversy presented by this record, involving as it does a contest between the courts of a state and of the nation, can be settled nowhere but in this supreme judicial tribunal of the nation.

The provision of the act of March 3, 1891, allowing writs of error from the circuit courts direct to this court in cases in which the jurisdiction of the circuit court is in issue was adopted from the act of February 25, 1889, c. 236, which was passed for the express purpose of restoring to this court the jurisdiction to review the action of the circuit courts on removal proceedings, which had been taken away by the act of March 3, 1887, c. 373, as corrected by the act of August 13, 1888, c. 866.

The act of February 25, 1889, c. 236, provided that in all cases where a final judgment or decree should be rendered in a circuit court of the United States in which there was "a question involving the jurisdiction of the court," the party against whom the judgment or decree was rendered should be entitled to an appeal or writ of error to this court, without reference to the

amount of such judgment or decree, but where it did not exceed the sum of $5,000, the question of jurisdiction should alone be reviewable. In Richmond & Danville Railroad vs. Thouron, 134 U. S. 45, it was held that there could be no review under the act of February 25, 1889, prior to final judgment, but it was assumed that a motion to remand to the state court raised a question involving the jurisdiction of the circuit court within the meaning of that act.

So also in Chicago, St. Paul, Minneapolis & Omaha Railway vs. Roberts, 141 U. S. 690, which arose under section 5 of the act of March 3, 1891, while it was held that this court had no jurisdiction under that act to review an order of the circuit court remanding a case to the state court, in advance of the final judgment on the merits, the opinion concludes with the observation that "by the motion to remand the jurisdiction of the circuit court was put in issue."

A motion in a circuit court of the United States to remand a case that has been removed from a state court necessarily puts "in issue" the "jurisdiction" of the circuit court, as a federal court, and if the unsuccessful party elects to test the question of jurisdiction alone his remedy is by writ of error direct to this court.

In Smith vs. McKay, 161 U. S. 355, relied upon by opposite counsel as conclusive upon the question at bar, no question was raised by either party as to the jurisdiction of the circuit court, *as a federal court*. That was conceded by both parties. The question was simply whether the case was cognizable at law or in equity.

But at bar the question of jurisdiction relates to the jurisdiction of the court below, as a federal court, in a contest for exclusive jurisdiction between it and the state court.

The argument of opposite counsel is really addressed to the merits of the case, in other words to the jurisdiction of the circuit court, and not to the jurisdiction of this court to review the judgment of the circuit court. They insist that because Powers and the Railway Company are citizens of different states, the Railway Company had a right to remove the case upon the grounds alleged in its petition for removal, although the time prescribed by the Act of Congress for removing the case had long expired. But that is the very question for decision here when the case comes on to be heard on its merits. And if this court shall then hold that the petition for removal was not filed in time or was otherwise defective, its reversal of the judgment of the circuit court will be upon the ground that that court was without *jurisdiction* to render the final judgment brought under review.

Or, suppose we had followed our adversary's advice, and had taken this writ of error to the Circuit Court of Appeals instead of to this court, and that the Circuit Court of Appeals had reversed the judgment for error on the part of the circuit court in overruling the motion to remand. The reversal would have been on the ground that the circuit court had erred in refusing to remand the case, and that it was therefore without *jurisdiction* to render the final judgment. In whatever

court the question is presented it remains a question of the *jurisdiction* of the circuit court to render the final judgment complained of.

The motion to dismiss is not coupled with a motion to affirm under rule 6. We do not therefore discuss the question of the jurisdiction of the *circuit* court. It is enough, for the purposes of the present motion, to know that its jurisdiction, as a federal court, is in issue. But we can not refrain from observing that the petition for removal was not only out of time, but clearly defective in other respects. It did not show the citizenship of either Boyer, Hickey or Evans. Indeed it did not mention Boyer's name. And while it indulged freely in adjectives, it alleged no *facts* to show that Evans and Hickey "were fraudulently and improperly joined as defendants." Even on the defendants' view of the law it fell far short of presenting on the face of the record a case which required the state court to "proceed no farther." Crehore vs. Ohio & Mississippi Railway Co., 131 U. S. 240. And if the doctrine of estoppel is to be invoked it reacts on the defendant, for after filing its petition for removal, it tried the case on its merits in the state court and took an appeal on the merits to the Court of Appeals of Kentucky, and gave a supersedeas bond.

No exception is taken, or indeed can be, to the form of the present appeal, which was granted solely upon the question of the jurisdiction of the circuit court, accompanied by the proper certificate within the rulings

in Shields vs. Coleman, 157 U. S. 168; In re Lehigh Mining Co., 156 U. S. 322, and Smith vs. McKay, 161 U. S. 355, 357.

We respectfully submit that the motion to dismiss should be overruled.

LAWRENCE MAXWELL, JR.,
Counsel for Plaintiff in Error.

WM. GOEBEL,
ALFRED MACK,
Of Counsel.

No. 144.

Brief of Maxwell v. Goebel

C. C.

Filed Nov. 29, 1897.

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 144.

JOHN T. POWERS, *Plaintiff in Error,*

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY.

In Error to the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR THE PLAINTIFF IN ERROR.

Printed by JAMES BARCLAY, 103-113 Canal St., Strobridge Building, Cincinnati, O.

Supreme Court of the United States,

OCTOBER TERM, 1897.

No. 144.

JOHN T. POWERS, *Plaintiff in Error*,

vs.

THE CHESAPEAKE & OHIO RAILWAY COMPANY.

In Error to the Circuit Court of the United States for the District of Kentucky.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On September 7, 1893, the plaintiff commenced his action by filing a petition in the Kenton Circuit Court at Independence, Kentucky, against the Chesapeake & Ohio Railway Company, William D. Boyer, David Evans and Edward Hickey (Rec. 1). The summons was served on the Chesapeake & Ohio Railway Company September 26, 1893 (Rec. 5). It was also served on the defendants Boyer and Evans. Hickey was returned not found (Rec. 6). On October 14, two days before its answer was due, the Railway Company filed its petition for removal to the Circuit Court of the United States (Rec. 3). The petition was based upon the ground that there was a separable controversy be-

tween the plaintiff and the Railway Company, the plaintiff being alleged to be a citizen of Kentucky, and the Railway Company a citizen of Virginia and West Virginia, and also upon the ground that the defendants Boyer, Evans and Hickey were "fraudulently and improperly joined as parties defendants for the sole purpose of defeating the right of the petitioner to remove to the United States Circuit Court." The state court, on November 6, approved the Railway Company's bond for removal, and on December 4 the Company filed a transcript in the Circuit Court of the United States (Rec. 1). On December 14, the plaintiff filed in the Circuit Court of the United States an answer to the petition for removal, in which he denied that there was a separable controversy, and also that the defendants Boyer, Evans and Hickey, "or any of them, were fraudulently or improperly joined as parties defendant for the purpose of defeating the pretended right of removal of the defendant, the Chesapeake & Ohio Railway Company, to the United States Circuit Court" (Rec. 4). On December 18, the case was heard on the plaintiff's motion to remand (Rec. 6), and on January 10, 1894, the court sustained the motion and remanded the case to the state court (Rec. 6). On February 6, 1894, the Railway Co. filed in the state court its demurrer and answer to the petition (Rec. 15). On October 16, 1894, the case, on motion of the plaintiff, was discontinued except as to the Railway Company, its demurrer to the petition was overruled and the plaintiff filed a reply. Thereupon the Railway Company filed a second petition for removal, based upon the same grounds as its former petition, to wit: that there was a separable controversy between the plaintiff and the Railway Company, and that "in the bringing of this suit heretofore on the— day of ——, 189—,

David Evans and Edward Hickey were fraudulently and improperly joined as parties defendant for the purpose of defeating the right of your petitioner to remove this cause to the United States Court." The petition further alleged that the suit as to Evans and Hickey was dismissed on October 16, 1894, and "that the said cause is now for the first time pending as to the said Chesapeake & Ohio Railway Company alone" (Rec. 17). The court declined to approve the removal bond. The defendant filed an amended answer which was traversed of record and the case proceeded to trial before a jury, resulting in a verdict and judgment for $10,000 (Rec. 17, 21). On December 3, 1894, the Railway Company filed in the Circuit Court of the United States a second transcript from the state court (Rec. 7). On December 8, the plaintiff filed a motion to remand to the state court upon the ground "that the cause was not removable; that the petition and bond for removal were not filed within the time fixed by law for the filing thereof; and that the question sought now to be made by the second petition for removal has been heretofore adjudicated by this court and said former adjudication is relied on in bar of this second removal proceeding" (Rec. 27). The plaintiff also filed an answer to the petition for removal denying that the defendants, Evans and Hickey, or either of them, were joined as parties defendant, either fraudulently or improperly, or for the purpose of defeating the alleged right of removal of the defendant the Chesapeake & Ohio Railway Company (Rec. 28). On December 22, 1894, the Railway Company, by leave of the Circuit Court of the United States, over the plaintiff's objection, filed therein an amendment to its second petition for removal (Rec. 28, 29). The amendment alleged that "in the bringing of the original suit herein, to wit: on the 7th day

of September, 1893, W. D. Boyer and Edward Hickey were fraudulently and improperly joined as parties defendant in the suit and for the sole purpose of defeating the right of your petitioner to remove this case to the United States Circuit Court;" that said Boyer and Hickey were, at the commencement of the suit, and ever since, have been citizens of Kentucky, and Evans a citizen of Virginia; that the Railway Company had inadvertently and by mistake written in its petition for removal the name of David Evans, when it was intended to write the name of William D. Boyer; and that "by reason of the said improper and fraudulent joinder of said Boyer and Hickey, which it avers was for the sole purpose of defeating the jurisdiction of the United States Court, the plaintiff is estopped by its fraudulent and improper conduct from now asserting that its said petition for removal was not filed within the time required by law" (Rec. 29). On January 2, 1895, plaintiff filed an answer to the petition for removal and amendment thereof, denying the charges of fraud (Rec. 31). On January 7, 1895, the court overruled the plaintiff's motion to remand to the state court (Rec. 43). The plaintiff also filed a plea to the petition for removal (Rec. 54), to which the Railway Company demurred (Rec. 57), which demurrer was sustained (Rec. 57).

The plaintiff has elected to test the question of jurisdiction alone, and brings the case direct to this court on an appropriate certificate (Rec. 58).

ASSIGNMENT OF ERROR.

The circuit court erred in allowing the Railway Company's second petition for removal and in refusing to remand the case to the state court, and was without jurisdiction to render the final judgment brought under review.

ARGUMENT.

The circuit court sustained its jurisdiction under the second petition for removal, and refused to remand the case to the state court, on the ground that the joinder of the individuals as defendants "was a mere device to defeat a removal by the non-resident defendant within the statutory time and with no purpose of ever pushing the case to judgment against the others," and that "the plaintiff ought not to be allowed to take advantage of a delay in removal which his own fraud brought about, and that he must be estopped to use that delay as an objection" (Opinion, Rec. 48). The court freely conceded that if the individuals had been originally joined as defendants bona fide, their subsequent dismissal "by the court or otherwise" after the time allowed by the statute for removing the case, would not give the Railway Company a right to remove against the plaintiff's objection (Opinion, Rec. 52). The decision was placed upon the ground that the original joinder of the individuals was fraudulent.

1. The first and most obvious answer to this position is not only that a petition for removal on that ground, as on any other, must be filed within the time prescribed by the statute, as held in Kansas City Railroad vs. Daughtry, 138 U. S. 298, but that such a petition had been duly filed by the Railway Company and heard and overruled in the circuit court, and the case remanded to the state court, and the Railway Company's remedy was by writ of error to this court. It had no right to file a second petition for removal on that ground, and the state court was not required to yield its jurisdiction upon such second petition. The claim that the individuals had been joined fraudulently had been adjudicated.

2. The second petition for removal, if it had been filed in time, was fatally defective, because it did not, on the face of the record, show a removable case. But unless that is shown the state court is not bound to surrender its jurisdiction and proceed no further. Crehore vs. Ohio & Mississippi Railway Company, 131 U. S. 240.

(a) The petition did not allege the citizenship of either Evans, Hickey or Boyer; indeed it did not mention Boyer's name. The Railway Company undertook to supply these omissions by an amendment of the petition filed in the circuit court long after the case had proceeded to judgment in the state court. But that is not permissible. Crehore vs. Ohio & Mississippi Railway Company, 131 U. S. 240. The state court has a duty to perform, which is to proceed with the case unless the record upon which it is asked to surrender its jurisdiction shows on its face, and at the time, a removable case. Crehore vs. Ohio & Mississippi Railway Company, 131 U. S. 240.

The learned circuit judge says, in his opinion, that "it does appear from the ruling of this court on the first petition for removal, which was made a part of the record in the state court, that it was then admitted by both plaintiff and defendant that Boyer and Hickey were citizens of Kentucky" (Rec. 47). The opinion thus referred to (Rec. 14) was "filed," it is true, but it was not a part of the record, nor does it state an admission that the individual defendants or any of them were citizens of Kentucky at the commencement of the suit. But supposing that difficulty to be out of the way, there was no showing to the state court of the citizenship of either of the individual defendants at the time of filing the second petition for removal.

(b) The petition alleged no *facts* to show that the

individual defendants had been fraudulently or improperly joined. It is like the reply in Wood vs. Carpenter, 101 U. S. 135, 143, of which this court said: "It contains some vigorous declamation, but is wanting in the averments of facts, which are indispensable to give it sufficiency as a pleading." This court has often applied the familiar rule that where fraud is relied on it is not sufficient to make the charge in general terms, but that the ultimate facts constituting the fraud must be alleged, and that the use of offensive adjectives does not supply the want of allegations of fact. Van Weel vs. Winston, 115 U. S. 228, 237; Ambler vs. Choteau, 107 U. S. 586, 591; Fogg vs. Blair, 139 U. S. 118, 127.

While it is true that the determination of issues of fact arising on a petition for removal is for the federal court and not for the state court, the latter is not required to surrender its jurisdiction upon a petition which merely calls names without alleging facts.

3. The evidence did not justify the conclusion that the individual defendants had been joined fraudulently or improperly.

Under this head the main difficulty is in apprehending what the counsel for the Railway Company conceives to be the precise "fraud," of which the plaintiff is supposed to have been guilty.

It is not pretended that the plaintiff did not have a cause of action against the individual defendants, or that he joined them collusively. The judgment which he has recovered against the company in the state court presupposes the negligence of the individuals who were its employes; otherwise it would not be liable.

The "fraud" in the view of the circuit court, seems to have consisted in dismissing the individual defendants, or rather in the inference deduced therefrom that the

plaintiff's motive in joining them originally was to prevent the Railway Company from removing the case. But one's motives for doing that which he has a right to do are not imputable. The nearest the learned circuit judge got to defining the plaintiff's "fraud" was to say that he had "no purpose of ever pushing the case to judgment against the individual defendants." But is it a fraud within the contemplation of law for a plaintiff who has a real claim against several defendants, as much against one as against the others but with a right of only one satisfaction, to join them in strict accordance with the rules of procedure in one action, simply because he may have a "purpose" not to push the case to judgment against all? Such "purpose" could not be pleaded in bar or abatement of the action or be made the basis of a motion to dismiss it, and it does not become the subject of legal cognizance or constitute fraud in law simply because it happens to interfere with the power of a defendant to comply with the conditions of the federal statute for removal. Congress has prescribed those conditions and they can not be evaded or enlarged by imputing fraud to a plaintiff who merely exercises a strictly legal right.

But assuming that the plaintiff's "purpose" not to push the case to judgment against the individual defendants is open to inquiry, and if established constitutes a "fraud," of which the Railway Company may complain in law, the circuit court's conclusion of fact was not justified by the evidence.

The circuit court instead of observing the rule which declares that fraud shall not be presumed or lightly imputed, took the position that an original purpose not to push the cases to judgment against the individuals was to be inferred from their subsequent dismissal,

in the absence of a satisfactory explanation of that act. But the subsequent dismissal of one or more of several defendants is entirely consistent with an original purpose to push the case to judgment against all. And where a course of conduct is consistent with an honest and lawful purpose fraud can not be inferred from it.

In this case the plaintiff was obliged to dismiss as to Hickey in order to secure a trial at that term, under the following provision of Carroll's Kentucky Code (1895).

Sec. 363. Ordinary actions shall stand for trial at the first term after process has been served on the defendant, as specified in section one hundred and two. An action upon contract, wherein the summons has been served in due time, as provided in section one hundred and two, upon part only of the defendants, shall stand for trial at the first term as to those so summoned, and may be continued as to the others for further proceedings. In other ordinary actions, the plaintiff can only demand a trial at any term as to part of the defendants upon his discontinuing his action on the first day of such term as to the others.

Under the decisions of the Court of Appeals of Kentucky it would have been error to have tried the case without discontinuing as to Hickey. Hedger vs. Downs, 2 Met. 160; Buckles vs. Lambert, 4 Met. 330.

The dismissal of Hickey was therefore essential to prevent a postponement of the trial, with all its attendant disadvantages, and is consequently accounted for on honest grounds.

But unless Hickey was improperly joined and dismissed the plaintiff's course with respect to Boyer and Evans worked no harm to the Railway Company, and is therefore immaterial; for Hickey was a citizen of Kentucky, and his presence as a defendant effectually prevented the Railway Company from removing the case,

without reference to the other defendants. But we can readily suppose that when the plaintiff found it necessary to dismiss Hickey, he deemed it expedient to dismiss Boyer and Evans also, in order to avoid the prejudice which an apparent discrimination against those two employes might arouse; or he may have required their evidence free from the entanglements which their continuance as responsible defendants imposed; or he may have feared the influence of their presence as defendants on the particular jury before which the case was to be called; or for one or more of a dozen reasons, entirely consistent with an original purpose to push the case to judgment against them, and having no connection with the Railway Company's desire to remove the case to the federal court, the plaintiff may have seen fit to dismiss the individual defendants; and in the face of an answer denying all fraud, and with the burden of proof upon the Railway Company, the plaintiff was not called upon to state to the circuit court his reasons for dismissing Boyer and Evans and Hickey, or either of them, as a condition of relieving himself from the presumption of fraud with which the court seems to have entered upon the hearing.

It appears from the record in the state court that the defendants had filed a motion to transfer the case. The motion itself is not in the record, but it is shown to have been overruled immediately upon the discontinuance of the case as to the individual defendants (Rec. 17). This motion may account for the discontinuance as to them. In Kenton county there are two places of holding court. The action was pending at Independence. The motion was evidently to transfer to Covington, based upon the ground that the defendants other than the Railway Company lived in Covington. That being so, they could prevent a trial at Inde-

pendence, under the following provision of the Statutes of Kentucky (Barbour & Carroll, 1894), while the Railway Company, being a foreign corporation, had no such right. The dismissal of the individual defendants removed the embarrassment, and may have been resorted to for that purpose.

Sec. 980. That in counties having a population of less than one hundred and fifty thousand, and which constitute separate judicial districts, the circuit courts shall be in continuous session, and shall be held in cities of the second class, where there are or may be such cities, but the judge of such courts shall hold part of such sessions at the county seat of the county where the same is not such city, such part to be not less than two weeks if the business of the court require so long, in February, June and October of each year. And all suits in which the defendants, or the greater number of defendants, reside nearer to said county seat than to said city of the second class, shall be docketed and tried at said county seat, and the process in such cases shall so indicate. Foreign corporations, non-residents of the county, and common carriers whose lines extend into any part of said (city or) county, shall be (deemed) residents of the places, and the plaintiff in any action against any defendant may select at which place he will have the case docketed and tried, and the process shall be made by the clerk to so indicate.

II.

The second petition for removal suggests that the dismissal of the individual defendants left the case for the first time one wholly between citizens of different states, and that the Railway Company's petition for removal filed immediately thereafter was therefore in time, independent of the considerations based on the alleged fraud of the plaintiff. But that theory was rejected by the circuit court, and properly. The act of Congress makes no provision for a petition for removal

under such circumstances, as is seen the moment we ask how soon after such dismissal must the remaining defendant file his petition for removal. The case is not a new case and the defendant is not required to file a new answer. But the only provision of the statute is for a petition for removal "at the time, or any time before the defendant is required by the laws of the state or the rule of the state court in which such suit is brought to answer or plead to the declaration or complaint of the plaintiff." The right of removal is statutory, and before a party can avail himself of it he must show that his case comes within some provision of the statute. Insurance Company vs. Pechner, 95 U. S. 183. There is no provision for the case supposed.

It was held under the act of 1875 that there was no provision for removal at the first term at which a trial could be had on the issues, as finally settled by amendment, but only at the first term at which the cause, as a cause, could be tried. Babbitt vs. Clark, 103 U. S. 606, 612; Phoenix Life Insurance Co. vs. Walrath, 117 U. S. 365; Edrington vs. Jefferson, 111 U. S. 770.

It must also be remembered that after the individual defendants were dismissed the Railway Company had a hearing and decision on its demurrer to the petition, before filing its second petition for removal. No statute has ever permitted a removal after the petitioner has had the benefit of a hearing on the merits, whether on demurrer or otherwise, in the state court. Alley vs. Nott, 111 U. S. 472; Scharff vs. Levy, 112 U. S. 711; Gregory vs. Hartley, 113 U. S. 742.

III.

It is true that where no objection is made in the circuit court on the ground that the petition for removal

has not been filed in time the question is not open on appeal. But at bar the objection that the second petition for removal was not filed in time was duly and promptly made in the circuit court (Rec. 27); and if it was well taken requires a reversal of the judgment of that court. In the very case cited by opposite counsel (Martin's Administrator vs. Baltimore & Ohio Railroad Co., 151 U. S. 673, 687), this court said:

"As the petition for the removal of this case into the Circuit Court of the United States was not filed in the state court within the time mentioned in the act of Congress, it would follow that, if a motion to remand upon that ground had been made promptly and denied, the judgment of the Circuit Court of the United States must have been reversed, with directions to remand the case to the state court. Edrington vs. Jefferson, 111 U. S. 770; Baltimore & Ohio Railway vs. Burns, 124 U. S. 165."

In Kansas City Railroad vs. Daughtry, 138 U. S. 298, one of the grounds of the petition for removal was that a co-defendant had been joined, as a nominal defendant, for the sole purpose of preventing the petitioner from removing the case into the United States court, but this court held that, because the petition for removal had not been filed at or before the time when the petitioner's answer was due, the state court was right in refusing to surrender its jurisdiction.

IV.

Since the decision below, Judges Taft and Lurton have held that, in a case like the present, employer and employe are not jointly liable, and that the employer may therefore remove on the ground of a separable controversy. Warrax vs. C. N. O. & T. P. Ry. Co., 72 Fed. Rep. 637; Hukill vs. M. & B. S. R. R. Co., 72 Fed. Rep. 745. The decisions are based upon the following cases

in which it is held that master and servant are not liable jointly for an injury occasioned by the negligence of the servant in the course of the master's business: Parsons vs. Winchell, 5 Cush. 592; Mulchey vs. Methodist Religious Society, 125 Mass. 487; Clark vs. Fry, 8 Ohio St. 358, 377; Campbell vs. Sugar Co. 62 Maine, 553; Beuttel vs. Railway Co., 26 Fed. 50; Page vs. Parker, 40 N. H. 47, 68; Bailey vs. Bussing, 37 Conn. 349, 351.

If this view be correct the joinder of the individual defendants did not affect the Railway Company's power of removal, and the whole argument in support of the decision below on the second petition for removal falls to the ground.

We respectfully submit that the circuit court erred in assuming jurisdiction upon the second petition for removal, and that its judgment should be reversed.

LAWRENCE MAXWELL, JR.

WM. GOEBEL,
ALFRED MACK,
Of Counsel.